FEDERATION REPORTS.

G. F. L. EWIN v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan C. J., Callow and Spenser-Wilkinson, JJ.) September 10, 1949]

[F.M. — Criminal Appeal No. 72 of 1949]

Penal Code, Ss. 52, 79, 96 et sequitur, 300 and 351 — Charge of murder — Defence of mistake of fact — Defence of private defence not put to assessors — Misdirection — Evidence of criminal acts other than those covered by the charge — Res gestae.

In this case the appellant was originally charged with murder. The appellant in his defence stated that he entered a hut in the belief that there were six armed terrorists in the hut and that he had fired his gun at the bed on which he saw something move. There were in fact no terrorists in the room and the appellant in fact fired at and killed a Chinese child. The learned trial Judge in his summing up referred to section 79 of the Penal Code and the defence of mistake of fact. The assessors thereupon found the appellant guilty of culpable homicide not amounting to murder. On appeal it was argued that the learned trial Judge had not directed the assessors that the appellant, in acting as he did under the circumstances as he, in good faith, believed them to be, might have been exercising the right of private defence.

Held, that the failure of the trial Judge to direct the assessors to consider whether or not the appellant was exercising the right of private defence constituted a misdirection and therefore the conviction must be set aside.

Observations on the admissibility of evidence tending to show that an accused person has been guilty of criminal acts other than those covered by the charge.

Cases referred to:—

(1) *Makin v. A. G. for New South Wales* (1894) A.C. 57 at p. 65.

(2) *Noor Mohamed v. The King* (1949) A.C. 182.

(3) *Tan Geok Kwang v. Public Prosecutor* (1949) M.L.J. 216.

CRIMINAL APPEAL.

M. Edgar for the Appellant.

N. L. Cohen for the Respondent.

The Judgment of the Court of Appeal was delivered by:—

Willan, C. J.: — In this case the appellant was charged with committing murder by intentionally causing the death of a Chinese female child, Lai Ah Moi, aged about five years, at the 5th mile Jelapang Road, Ipoh, on the 8th June, 1949. It is a difficult case and one of some importance.

The facts are that the appellant is a police sergeant. He arrived in Malaya for the first time in October 1948, and his knowledge of the Malay language is very limited. He was stationed in a mining area at Jelapang in charge of a number of police posts in that area. That has been a dangerous area for terrorist activity for some time, and this was known to the inhabitants thereof, including the appellant.

On the day in question the appellant, who had consumed a certain amount of beer on an empty stomach — he was not drunk — arrived at the bungalow of the General Manager of the Meru Tin Mine about 5.30 p.m. He told the General Manager that he was going to visit a Chinese mine nearby, and there is no doubt that this was for the purpose of searching for terrorists. The appellant negatived the suggestion of the General Manager that he should wait until the following morning and, about 6 p.m., set off for the Chinese mine accompanied by five special constables, belonging to the Meru Tin Mine. The appellant was armed with a sten-gun and each of the special constables with a rifle.

In order to reach the Chinese mine the party had to cross over the Jelapang-Chemor Road. In so doing they met a wireless police patrol in motor trucks. The appellant stopped the patrol and certain members of it, including police constable Harun, joined the appellant's party to search for terrorists. Throughout the operation of searching, none of the party, except the appellant, used his fire-arm.

On approaching the Chinese mine the appellant fired several shots from his sten-gen and wounded a Chinese head-man of that mine, who was supervising the mine labour. Evidence was given of this at the trial and, for reasons which are stated later in this judgment, we hold that that evidence should not have been admitted.

Leaving the wounded Chinese behind (he was later attended to by the wireless police patrol on the Jelapang-Chemor road) the appellant and his party proceeded beyond the Chinese mine along a path towards a rubber estate. They skirted the edge of the rubber and turned back along the path, in the direction of the Jelapang-Chemor road, until they came to a group of huts on the side of the path. By this time the party had split up into two sections. The appellant took charge of one section and a Police Corporal the other. Police constable Harun was in appellant's party. The appellant stopped at one hut to examine the identity cards of the occupants, and whilst this was being done, Harun saw two Chinese enter one of the other huts. He informed the appellant of this — speaking in Malay — and pointed in the direction of that hut.

The evidence regarding this part of the case is very important, and we must deal with it in detail. Harun's evidence was :—

> I saw two Chinese enter a house and close the door. That was the third house from where we were. I told accused what I had seen. The two Chinese I had seen entering the house were a man and a woman. I said to accused 'There is a house. Two Chinese have entered it and closed the door'. When I said 'There is a house' I pointed to the house I meant. Accused said 'Take cover and advance forward'. We proceeded to the house I had pointed out.
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> As we did so I heard firing from a sten-gun. It was directed at the second house from where we had been examining cards — not the house I had pointed out. While we were surrounding the house I had pointed out I heard a sten-gun firing again. It was not coming from the house we were surrounding but from the house between it and the one at which we had been examining the cards.

That evidence was corroborated by the other Malay police constables.

The appellant made a statement from the dock. In that statement he said :—

> A constable came rushing to me. He seemed very excited. I understood him to say 'Anam (6) orang jahat pergi hut'. He pointed towards two huts which were close together.
>
> I told my men to separate to left and to right and surround the hut. I fired immediately at the hut in order to try and flush them out. I went running towards the hut. In taking a short cut I fell in some swamp and got covered with mud. I entered the hut with my sten-gun at the ready fully expecting to see six armed men. It was dark inside the hut. The bed seemed to take up most of the room. I saw something move on the bed and fired at the bed.

In actual fact there was no armed terrorist on the bed, and the appellant fired at and killed the unfortunate Chinese child, Lai Ah Moi.

In his summing up, the learned trial Judge said, *inter alia* :—

> Then, gentlemen, you will remember the evidence of constable Harun and the other members of the police who were present. Harun is quite clear that he did not say anything about six armed men. He did say he saw two people and he said he prefixed his speech with the word 'Tuan' and you will consider the possibility of 'Tuan' being taken for 'Anam'. But at the same time he made a gesture of pointing. He agreed that that too might be misunderstood as there was not one house but two houses in the direction in which he was pointing. Whether he was misunderstood or not by the accused man is, of course, a question you have to consider. That there was room for misunderstanding is, to put it at the lowest, a possibility, but you will also remember that if the accused man misunderstood not only his words but his gestures the other policemen who were present did not make any such mistake because the house which they in fact surrounded was the one which Harun says he pointed out and was not the one into which the accused entered and in which he fired his gun.

Both the assessors found the appellant guilty of culpable homicide not amounting to murder and the learned trial Judge agreed with them. In coming to that conclusion they must have accepted the facts to be as stated by the appellant i.e. that when he entered the hut he believed in good faith there were six armed terrorists inside. That being so, section 79 of the Penal Code, which the learned trial Judge explained to the assessors is relevant. It reads :—

> Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it.

Having explained the purport of the section and also of section 52, which defines "good faith", the learned trial Judge directed the assessors as follows :—

> I shall be dealing in a few moments with the material on which you are asked to say that there was a mistake of fact, but at this stage I want to make it clear that even if you are satisfied after mature consideration that there was such a mistake of fact it by no means follows that the accused man is not guilty of any offence. A police officer is by law entitled in certain circumstances to use force even up to the extent of causing death. He is, however, only entitled to use such force when it is necessary to prevent a dangerous crime from being committed or to effect the arrest of persons who are accused of dangerous crime. That, gentlemen, is not an exhaustive statement of the law but it is sufficient for the purpose of this case. Now, on any showing in this particular case I think you will find it very difficult to say that even if in his own mind the facts were as the accused man says, there was any justification for actually discharging his gun into the figure on that bed on the ground that such an action is necessary to arrest the figure on the bed. So, gentlemen, if you come to the conclusion that he was under a genuine mistake of fact of the sort he has described to you it is open to you to say that he is not guilty of murder but that he is guilty of what is commonly called manslaughter and what the law of this country calls culpable homicide not amounting to murder. Of course, if you accept what he says as to his state of mind and if you are satisfied that assuming the facts to have been as he says he believed them to be he could reasonably and did actually believe that shooting was necessary to effect the arrest of the figure on the bed, then it is open to you to say he is not guilty of any offence.

The learned trial Judge went on to put the salient parts of the evidence to the assessors, and concluded his summing up as follows :—

> Gentlemen, these are the salient parts of the evidence. There are other parts which I do not propose to go over but which you will also bear in mind, and considering that evidence as a whole you will ask yourselves whether the accused has succeeded in creating in your minds a feeling amounting to reasonable doubt that there may be truth in what he says, that when he went into that house he expected to find six armed men, that having had liquor, that owing to his juvenile mentality and having had reports of the presence of bandits in the area he was in an excitable and anxious frame of mind, that even when he found there were no armed bandits in the house his mentality being what it was he still was under the impression that the human being was a bandit. If you have a reasonable doubt to that effect then no more is necessary. It is not for him to prove beyond doubt. If you have in your minds a reasonable doubt to that effect then it is your duty to give him the benefit of it and say he is guilty of manslaughter. And if in addition you have formed a belief amounting to a reasonable doubt that he

reasonably could and actually did believe that shooting was necessary to effect the arrest of that supposed bandit then you will say he is not guilty of any offence.

From these two passages of the summing up it is clear that the assessors were directed to consider an acquittal only on the footing that the appellant was attempting to effect the arrest of the figure on the bed, whom the appellant genuinely believed to be an armed terrorist.

In coming to the opinion to which they came, the assessors must have had in mind exception 3 to section 300 of the Penal Code, which, although it was not mentioned by the learned trial Judge in his summing up, was specifically referred to by counsel for the appellant at the trial. It reads :—

> Culpable homicide is not murder if the offender, being a public servant, or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant, and without ill-will towards the person whose death is caused.

It would appear that by virtue of the provisions of section 79 and this exception to section 300, the appellant was found guilty of the offence of culpable homicide not amounting to murder.

In this Court the main ground of appeal was that the learned trial Judge had not directed the assessors that the appellant, in acting as he did under the circumstances as he, in good faith, believed them to be, might have been exercising the right of private defence.

The actual ground of appeal on this point reads :—

> The learned Judge had not considered the following:—
>
> .....
>
> (c) The fact that appellant was fully prepared to meet armed bandits when he entered the hut and was prepared to defend his own life.

The provisions of the law relating to the right of private defence are contained in section 96 *et sequitur* of the Penal Code. Section 96 reads :—

> Nothing is an offence which is done in the exercise of the right of private defence.

The first paragraph of section 100 reads :—

> The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated —
>
> First. — Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault.
>
> .....

Assault is defined in section 351 as follows :—

> Whoever makes any gesture or any preparation, intending or knowing it to be likely that such gesture or preparation will cause any person to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

That definition is relevant because the appellant at his trial said there was a movement by the figure on the bed.

In our view, on the evidence given in this case, the assessors should have been directed to consider whether or not the appellant was exercising the right of private defence. In fairness to the learned trial Judge it should be stated that Counsel for the appellant at the trial made no reference to any of the sections of the Penal Code relating to that right.

Had the assessors been directed that, if, in the circumstances, they were of opinion that the mistake of fact under which the appellant acted (assuming that they accepted the evidence of such mistake) was such as to make it appear to him in good faith to be necessary to shoot in self-defence, they could find him not guilty, it is impossible for us to say whether or not they would have reached the conclusion which they did.

On account of the non-direction of the assessors on this point we set aside the conviction and sentence, and order a re-trial.

The appellant has been acquitted on the charge of murder. That acquittal is final and there is no right of appeal against it. Accordingly the appellant can only be re-tried on the charge of culpable homicide not amounting to murder.

We return now to the question of evidence having been admitted regarding the wounding by the appellant of the headman on the Chinese mine.

In *Makin v. A. G. for New South Wales*[1] Their Lordships of the Privy Council laid down the following two principles :—

(a) It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried; and

(b) ... the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged were designed or accidental, or to rebut a defence

which would otherwise be open to the accused.

These two principles were further stressed by Their Lordships of the Privy Council in the recent case of *Noor Mohammed v. The King*[2].

On the appeal, Federal Counsel argued that this evidence was admissible as part of the *res gestae*. When he was asked to justify the admission of it in the face of the decision in *Makin's case*, he contended that the evidence was not adduced to show that the appellant was likely to commit murder and that therefore principle (a) was not involved. He has failed to satisfy us that this evidence did not have this effect or that it is admissible under paragraph (b). Accordingly we hold that it should not have been admitted.

We would mention that admission of evidence of this nature was previously commented on adversely by this Court in Federation Criminal Appeal 65/1949 — *Tan Geok Kwang v. P. P.*[3].

Mr. Edgar, Counsel for the appellant in this Court, applied for bail pending the re-trial. We grant the appellant bail in the sum of $4,000 with two sureties.

Re-trial Ordered.

PUBLIC PROSECUTOR v. THORBURN.

[App. Crim. Juris. (Laville J.) September 15, 1949]

[J.B. — Criminal Appeal No. 2 of 1949]

Emergency Regulations, 1948, Section 6(c) — Charge of behaving in a disorderly manner — Meaning of "disorderly manner".

This was an appeal by the Public Prosecutor against the acquittal of the respondent on a charge of behaving in a disorderly manner while carrying a firearm contrary to s. 6 (c) of the Emergency Regulations, 1948. The learned Magistrate found as a fact that the respondent did discharge his pistol into the air but acquitted him on the ground that his intention in so doing was not proved.

Held, that if the conduct of a person is such that in all the surrounding and attendant circumstances it would tend to cause physical harm to the person or property of anyone or to create in the mind of a person of normal courage and firmness of temper, dismay or apprehension, then such conduct is disorderly within the meaning of section 6 (c) of the Emergency Regulations 1948.

Case referred to:—

(1) *Pointon v. Hill* (1883) 12 Q.B.D. 306.

CRIMINAL APPEAL.

D. B. W. Good for the Appellant.

K. E. Hatchard for the Respondent.

Laville, J. : — This is an appeal by the Public Prosecutor against the acquittal of Mr. Thorburn by the Circuit Magistrate, Kluang, on a charge of behaving in a disorderly manner while carrying a firearm at the Ulu Remis Estate, Layang Layang, on 24th May, 1949, about 1.30 a.m., contrary to sec. 6(c), Emergency Regulations, 1948.

The case was heard at Kluang on 25-7-49 and concluded the same day. The prosecution evidence was that Mr. Thorburn arrived at the Estate guardroom with his wife in a car from Johore Bahru about 1.30 a.m. He is the Manager of Ulu Remis Estate. Owing to the fact that his way lay through a danger area (from bandits) and his wife was with him, he had instructed a guard to meet him at Kulai about 10 p.m. to escort him in to his bungalow. He was late at Kulai and the guard had returned to the estate. He was therefore compelled to risk the journey from the main road to his bungalow unescorted through an admittedly dangerous area. As a result, when he reached the guardroom on the estate, he was out of temper to a marked degree.

When he reached the guardroom he called out Cpl. No. 8751 and abused him and spat at him; at the time he had a .45 Colt automatic in his hand which he pointed at the Cpl. Cpl. Sitam bin Ujang, No. 8725, corroborates this story as an eye-witness, but cannot say if the spitting was accidental or otherwise.

From the guardroom Mr. Thorburn went in his car to his house and was rung up by Sgt. Smith in charge of the Special Constables. Mr. Thorburn's wife answered the phone and very shortly after Sgt. Smith heard 8 automatic-weapon shots; shortly after Mr. Thorburn rang him up and complained about not having been met and escorted back. After hearing the shots Sgt. Smith went to Mr. Thorburn's bungalow and as a result of his orders the Special Constable on duty there, No. 23635, picked up 8 empty cartridge cases of .45 ammunition near Mr. Thorburn's car; his evidence is they were still warm, and that he saw accused fire 8 rounds. Mohamed Noor bin Raju, Special Constable No. 23642, confirms this.

Prosecution evidence as to the reactions of the people who heard the shots fired was as follows: Sgt. Smith says "If I hear a shot go off I would naturally think that it was from a bandit"; Jantan bin Yusof, Special Constable No. 23635, then at the gate says "I was afraid of the explosions"; Special Constable No. 23642 a chain away from Mr. Thorburn's house says "I lay down when I saw the flashes"; Manap bin Jema'at, Special Constable Body Guard, 7 chains away was awakened by the shots; he dressed hurriedly came out and took cover.